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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 264

HOMER M. PRESTON,
Respondent,

vs.

AETNA LIFE INSURANCE COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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The Scheffer Printing Company, FInancial 6-2694

INDEX

PAGE

Petition:

Jurisdiction 1
Opinions Below 2
Summary Statement of the Matter Involved 2
Questions Presented 4
Reasons for Granting the Writ 5

Brief:

Statement of the Case 9
Jurisdiction 9
Opinions Below 9
Specification of Errors 10
Argument 11
Conclusion 18

AUTHORITIES CITED.

Bergholm, et al v. Peoria Life Ins. Co. of Peoria, Ill., 284 U. S. 489, 52 S. Ct. 230, 76 L. Ed. 416 (1932) 6, 15

Crandall v. Continental Casualty Co., 179 Ill. App. 330 (1913) 12, 17

Ebbert v. Metropolitan Life Ins. Co., 289 Ill. App. 342 (1937) aff'd 369 Ill. 306 (1938) 5, 11, 12, 17

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 5, 7, 11

Hooker v. New York Life Ins. Co., 161 F. (2d) 852 (C.C.A. 7, 1947) 6, 15

Klinke v. Great Northern Life Ins. Co., 318 Ill. App. 43 (1943) 17

Martin v. Illinois Commercial Men's Association, 195 Ill. App. 421 (1915) 17

Palmer House Co. v. Industrial Commission, 388 Ill. 542 (1944) 14

PAGE

Rebenstorf v. Metropolitan Life Ins. Co., 299 Ill. App. 71 (1939) 16

Robison v. United States Health and Accident Ins. Co. (Abstract Decision) 192 Ill. App. 475 (1915) 17

Scanlan v. Metropolitan Life Ins. Co., 93 F. (2d) 942 (C.C.A. 7, 1937) 16

Schroeder v. Police & Fireman's Ins. Co., 300 Ill. App. 375 (1939) 17

Six Companies of California, et al v. Joint Highway District No. 13, 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114 (1940) 6, 15

Strehlow v. Aetna Life Ins. Co., 183 Ill. App. 50 (1913) cert. den. 186 Ill. App. xxxiii 17

Ward v. Coverley, 276 Ill. 416 (1916) 14

Wayne v. Traveler's Ins. Co., 220 Ill. App. 493 (1921) 17

Welte v. Metropolitan Life Ins. Co., 305 Ill. App. 120 (1940) 17

West, et al v. American Telephone and Telegraph Co., 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139 (1940) 6, 16

Williams v. Union Central Life Ins. Co., 291 U. S. 170, 54 S. Ct. 348, 78 L. Ed. 711 ..... 6, 15

Yoder, et al v. Nu-Enamel Corp., 117 F. (2d) 488 (C.C.A. 8, 1941) 14

Zitnik v. Burik, 395 Ill. 182 (1946) 6, 15

STATUTES.

Title 28, U. S. Code, Section 1254(1) 1

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AETNA LIFE INSURANCE COMPANY,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Your petitioner, Aetna Life Insurance Company, respectfully prays that a writ of certiorari may issue to the United States Court of Appeals for the Seventh Circuit to review a judgment of that Court (a) reversing a judgment of the District Court entered for petitioner on its motion for a summary judgment and (b) remanding the cause to the District Court for trial.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254 (1), Title 28 of the U. S. Code, and Rule 38 of the Rules of the Supreme Court, for the reason that the Court of Appeals has decided an important question of state law

in a manner contrary to the decisions of the highest court of Illinois and contrary to the overwhelming weight of authority in the Illinois intermediate appellate courts.

The judgment of the Court of Appeals was entered April 14, 1949 (R. 118). Rehearing was prayed, and denied on May 16, 1949 (R. 159).

Opinions Below.

The opinion of the Court of Appeals appears in the record at page 109 and is reported in 174 F. (2d) 10. The opinion of the District Court appears in the record at page 86 and is reported in 77 F. Supp. 743.

Summary Statement of the Matter Involved.

Respondent sought recovery under an accident insurance policy issued by petitioner for the amputation of his right leg immediately below the knee. The policy provided indemnity against a loss

> "resulting *directly and independently of all other causes* from bodily injuries sustained during the term of this policy *and effected solely through accidental means*". (R. 3, emphasis supplied).

The policy also contained a clause excluding recovery for injuries or other loss

> "caused *directly, wholly or partly,* . . . (2) by disease in any form". (R. 10, emphasis supplied).

Petitioner denied that the loss sustained by respondent was the result directly and independently of all other causes from bodily injuries within the insuring clause, and asserted that the loss was caused directly, wholly or partly by disease within the terms of the exclusion clause. (R. 25-26).

No facts in this case are in dispute. The parties stipulated that the statements of respondent, attending physicians and hospital records were true and correct and might be received in evidence at the trial of the case. (R. 33). The stipulated facts showed that for some period of time prior to October, 1944 plaintiff had been suffering from either arteriosclerosis or Buerger's Disease, a peripheral vascular disease in the right foot and leg, and a recognized disease in the medical concept of that word. On the date in question while seated at his desk, respondent removed the shoe of his right foot to relieve its soreness. In raising his right foot to his desk, he struck the base of the great toe on the corner of his desk, bruising the toe. The bruise did not heal because of the pre-existing disease of the circulatory system of the leg. An ulcer developed, gangrene followed, and it became necessary to amputate the leg just below the knee.

Based on the undisputed facts, petitioner filed its motion for summary judgment, contending that under the terms of the contract of insurance and the law of Illinois there could be no recovery. The motion for summary judgment was supported by a medical affidavit stating that the stipulated facts showed the pre-existing disease contributed to the loss.

Respondent filed two medical affidavits in opposition to the petitioner's motion for summary judgment. These affidavits in no way contradicted either the stipulated facts or petitioner's medical affidavit, but added that at the time of the injury the pre-existing disease was dormant and was caused to become active by the injury. The trial court accepted this statement of respondent's medical affidavits and after carefully reviewing the Illinois law (R. 86) held that under such facts there could be no recovery. Summary judgment was thereupon entered for petitioner.

The Court of Appeals by inference criticized the summary judgment procedure, though later stating that if the Illinois law was as contended by petitioner, and as found by the trial court, the summary judgment procedure was proper. The Court of Appeals, however, refused to accept the trial court's determination as to the Illinois law and reversed the judgment, holding as contended by respondent, that recovery could be had if the injury was the "proximate cause" of the loss even though the loss was contributed to by the disease. This ruling has the effect of reading this doctrine into contracts of insurance such as here involved even though it is contrary to the express terms of the contracts. The Court of Appeals remanded the case for trial to determine the "proximate cause".

Questions Presented.

1. *Under Illinois law can there be recovery on an accident policy containing the above limitation if a pre-existing disease contributes to the loss?* Under Illinois law applied to the contract provision here involved it is immaterial whether a pre-existing disease or an accidental injury is the "proximate cause" of the loss so long as the two causes have combined to produce the loss. To hold otherwise would allow the courts to rewrite insurance contracts, a procedure which both this Court and the Supreme Court of Illinois have repeatedly stated will not be permitted.

2. *May federal courts disregard holdings of state courts of last resort?* Under the *Erie* doctrine a federal court in determining local law must consider as binding upon it all decisions of the highest state court whether such decisions are by express holdings or by necessary implication.

3. *In the absence of holdings by a state court of last resort may federal courts disregard the compelling weight of authority among the various intermediate appellate courts of the state and create a "conflict" based on one adverse decision of the intermediate appellate courts as the basis of substituting its own judgment as the state law?* In determining an intermediate appellate court's judgment as a datum for ascertaining state law, federal courts must consider the weight of authority among the various intermediate appellate courts of the state, whether possible conflicting decisions by those intermediate appellate courts are actual holdings or mere *dictum,* are based on prior *dictum* or on more controlling authority, and whether those that are holdings discuss and distinguish or reject prior conflicting decisions.

Reasons for Granting the Writ.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. The Court of Appeals completely disregarded the only decision of the Illinois Supreme Court on this question, *Ebbert* v. *Metropolitan Life Insurance Co.,* 369 Ill. 306, in which it was held that there could be no recovery on an insurance policy of the kind involved in the instant case if the insured had a pre-existing disease that contributed to the loss. The decision of the Court of Appeals is thus in direct conflict with the decision of this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

If, under the *Erie* rule, federal courts in some instances are not required to accept as determinative of state law a decision of the highest state appellate court, the Court of Appeals' decision presents an important question of federal law which has not, but which should be settled by this Court.

2. The Court of Appeals did not follow the decisions of the Illinois intermediate appellate courts but held that one decision of one of the four Illinois appellate district courts, was sufficient to create a "conflict" among the intermediate appellate court districts and allow the Court of Appeals to substitute its own judgment as the law of Illinois. It did so although the case so relied upon (a) did not cite any other Illinois case touching on the point under consideration, (b) did not discuss or comment on other Illinois cases holding to the contrary, and (c) neither distinguished nor refused to follow former contrary decisions of the same court.

The procedure so taken by the Court of Appeals is in direct conflict with the decision of this Court in *Six Companies of California, et al.* v. *Joint Highway District No. 13 of California,* 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114 and *West, et al.* v. *American Telephone and Telegraph Co.,* 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139.

3. The effect of the decision is to completely eliminate from insurance contracts the insurance provisions and the exclusion clause as above set forth and to substitute therefor "proximate cause". To do this is to deny the language of the contract of insurance its plain, ordinary and popular meaning which this Court said cannot be done (*Bergholm et al.* v. *Peoria Life Ins. Co. of Peoria, Ill.,* 284 U. S. 489, 492; 52 S. Ct. 230; 76 L. Ed. 416, *Williams* v. *Union Central Life Ins. Co.,* 291 U. S. 170, 180; 54 S. Ct. 348; 78 L. Ed. 711), and to rewrite the contract of insurance which the Court of Appeals for the Seventh Circuit in *Hooker* v. *New York Life Ins. Co.,* 161 F. (2d) 852, 856, in construing Illinois law said cannot be done, and which the Illinois Supreme Court in *Zitnik* v. *Burik,* 395 Ill. 182, 186, said cannot be done. The decision of the Court of

Appeals is thus again in direct conflict with the decision of this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Wherefore it is respectfully urged that this petition for writ of certiorari to the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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IN THE

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No.

HOMER M. PRESTON,

Respondent,

vs.

AETNA LIFE INSURANCE COMPANY,

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The essential facts are stated in the accompanying petition for a writ of certiorari.

Jurisdiction.

The jurisdiction of this Court is shown in the accompanying petition.

Opinions Below.

The opinion of the Court of Appeals appears in the record at page 109. It is reported in 174 F. (2d) 10. The opinion of the District Court appears in the record at page 86. It is reported in 77 F. Supp. 743.

Specification of Errors.

If a writ of certiorari is issued, petitioner intends to urge that the Court of Appeals for the Seventh Circuit erred:

1. In holding that under the law of Illinois the doctrine of "proximate cause" will be read into a contract of insurance when not contained in the terms of the contract;

2. In refusing to follow the holdings of the highest appellate court of Illinois which, under the *Erie* doctrine, is binding on federal as well as state courts in applying state law;

3. In substituting its own judgment for the law of Illinois and basing its judgment on one of its own decisions rendered before the decision of this Court in the *Erie* case.

ARGUMENT.

I.

The Decision of the Court of Appeals That Under Illinois Law the Doctrine of "Proximate Cause" Will Be Read Into a Contract of Insurance Is in Direct Conflict with the Holding of the Supreme Court of Illinois in the Ebbert Case.

A.

Erie Railroad Co. v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 requires federal courts in interpreting state law to accept as binding the substantive law of the state as expressed by the highest appellate court, in this instance, the Illinois Supreme Court. The Court of Appeals' decision, while paying lip service to the *Eire* doctrine, states that the Illinois Supreme Court has not passed on this question though petitioner indicated to the Court of Appeals in its original brief, in oral argument before the Court, and in its petition for rehearing (R. 128) that the question had been determined by the Illinois Supreme Court and was no longer open for consideration.

In *Ebbert* v. *Metropolitan Life Ins. Co.,* 289 Ill. App. 342 (1st Dist. 1937) an action was brought on an insurance policy which provided for double indemnity if the insured's death resulted from "accidental means" independently of all other causes and was not contributed to by disease. The insured died as the result of (1) degenerative changes of the heart muscle and (2) surgical shock and anesthesia. Trial was held before the court without a jury resulting in judgment for plaintiff from which defendant appealed.

The Appellate Court reversed the judgment for plaintiff and entered judgment for defendant without remanding on the grounds that 1) the "means" thru which plaintiff lost his life, the anesthesia, was not accidental, and 2) "the insured was suffering from disease which directly contributed to his death" (p. 358).

On Appeal to the Supreme Court of Illinois (*Ebbert* v. *Metropolitan Life Ins. Co.*, 369 Ill. 306 (1938)) plaintiff challenged the right of the Appellate Court to enter findings of fact and reverse without remanding, inasmuch as plaintiff had introduced evidence at the trial tending to establish a cause of action. The Supreme Court upheld the right of the Appellate Court to reverse without remanding and affirmed the judgment. Although the opinion of the Appellate Court had dealt almost entirely with the first ground of that Court's decision, the definition of "accidental means", the Supreme Court after reviewing the evidence in detail ignored this ground and based its decision entirely on the second ground, that the insured's death was contributed to by disease or bodily infirmity. By so doing the Supreme Court indicated beyond question that in its opinion the important ground for denying recovery was the presence of the pre-existing disease that contributed to the plaintiff's loss.

It seems inconceivable that the Supreme Court of Illinois would have based its decision solely on the fact that the pre-existing disease contributed to the loss and deliberately ignored the alternative grounds on which the Appellate Court had primarily based its decision, that of "accidental means", the Supreme Court after reviewing sider the *Crandall* rule, (*Crandall* v. *Continental Casualty Co.*, 179 Ill. App. 330 (1913)) contended for by petitioner and accepted by the trial court herein, as the correct statement of Illinois law. The Court's long discussion

of the procedural point under the Civil Practice Act would have been wholly pointless if the Court did not accept as substantive law the *Crandall* rule.

If the findings of fact as entered by the Appellate Court did not as a *matter of law* prove the issue before that Court, that is, that plaintiff could not recover if a pre-existing disease contributed to the loss, such findings of fact would be meaningless and the Supreme Court in carrying out its reviewing function would have been required to so indicate. By its holding the Supreme Court must of necessity have passed on the law of the case to which the facts were applicable even though the Supreme Court did not restate the rule of law involved. The same would be true if the opinion of the Supreme Court had been simply "Per Curiam judgment affirmed". The rule of law stands that contribution by the pre-existing disease is sufficient to defeat recovery whether it be considered the "proximate cause" of the loss or not.

Both the Appellate Court and Supreme Court decisions in the *Ebbert* case were fully discussed in petitioner's brief in oral argument, and in the petition for rehearing (R. 128). Despite this the Court of Appeals refers only to the Appellate Court decision, and this only very briefly, with no reference whatsoever being made to the Supreme Court decision. We believe that to so completely disregard a ruling of the Supreme Court of Illinois on such an important question of local law amounts to an abuse of the *Erie* doctrine sufficiently grave to call for the exercise of this Court's supervisory powers.

B.

The most that can be said against petitioner's position is that the Illinois Supreme Court in the *Ebbert* case did not *expressly* sustain the *Crandall* rule but only *impliedly*

sustained it. Nevertheless, its sustaining of the *Crandall* rule was by necessary implication on facts of the case presented for decision and on points of law raised on the record necessary to the determination of the case. As such it meets the Illinois requirements for a decision. (*Ward* v. *Caverly*, 276 Ill. 416 (1916), *Palmer House Co.* v. *Industrial Commission*, 388 Ill. 542, 547 (1944)). As a decision, under the *Erie* doctrine it is binding on the Court of Appeals.

In *Yoder, et al.* v. *Nu-Enamel Corp.*, 117 F. (2d) 488 (1941) the Court of Appeals for the Eighth Circuit said (page 489):

> "The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having clear root in judicial conscience and responsibility, whether resting on direct, express or *obvious implication and inference*, should accordingly be given appropriate heed." (Emphasis supplied.)

If the above is not true, then the Court of Appeals in the instant case is in conflict with the Eighth Circuit and has decided an important question of federal law which has not been, but which should be settled by this Court.

II.

The Decision of the Court of Appeals That the Doctrine of "Proximate Cause" Will Be Read into a Contract of Insurance Such As Here Involved, and the Insuring Clause and Exclusion Clause Stricken, Is Erroneous Because It Is in Direct Conflict with Decisions of this Court, of the Court of Appeals in Interpreting Illinois Law and of the Supreme Court of Illinois.

The effect of the decision of the Court of Appeals is to strike from an insurance contract of this nature (a) the

provisions of the insuring clause limiting recovery to losses caused "directly and independently of all other causes from bodily injuries . . . and effected solely through accidental means" and (b) the provisions of the exclusion clause prohibiting recovery for losses "caused directly or indirectly, wholly or partly . . . by disease in any form", and to substitute therefor "proximate cause". To do so is to deny the contract of insurance its plain, ordinary and popular meaning in contravention of decisions of this Court (*Bergholm, et al.* v. *Peoria Life Ins. Co. of Peoria, Ill.*, 284 U. S. 489, 492; 52 S. Ct. 230; 76 L. Ed. 416; *Williams* v. *Union Central Life Ins. Co.*, 291 U. S. 170, 180; 54 S. Ct. 348; 78 L. Ed. 711) and to rewrite the contract of insurance, which the Court of Appeals for the Seventh Circuit in *Hooker* v. *New York Life Ins. Co.*, 161 F. (2d) 852, 856 in construing Illinois law said cannot be done, and which the Illinois Supreme Court in *Zitnik* v. *Burik*, 395 Ill. 182, 186 said cannot be done. To this extent the decision is again in direct conflict with the *Erie* doctrine. This point was also urged on the Court of Appeals by petitioner in its original brief, in oral argument, and in its petition for rehearing (R. 140), but no mention whatsoever is made of this point in the Court of Appeals' opinion.

III.

Had the Illinois Supreme Court Not Decided the Question in the Ebbert Case, the Decision Is Erroneous in Not Applying the Considered Judgment of the State Intermediate Appellate Courts.

The Court of Appeals' decision also pays lip service to, but fails to abide by, the words of this Court, in *Six Companies of California, et al.* v. *Joint Highway District No. 13 of California*, 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed.

114, and *West, et al.* v. *American Telephone and Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139 holding that, in the absence of a decision by the highest state appellate court, federal courts are bound by the decisions of state intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise. Assuming that the Illinois Supreme Court had not passed on the question at issue, almost without exception every decision of each of the four Illinois Appellate Court Districts has followed the *Crandall* rule, contended for by petitioner, denying recovery where a pre-existing disease contributes to the loss. *Rebenstorf* v. *Metropolitan Life Ins. Co.*, 299 Ill. App. 71, 85 (1st Dist. 1939) is the case that interjected the theory of "proximate cause" which it took bodily from the *dictum* of the Court of Appeals for the Seventh Circuit in *Scanlan* v. *Metropolitan Life Ins. Co.*, 93 F. (2d) 942 (1937), a case decided as general law prior to the *Erie* doctrine, which therefore did not purport to reflect the Illinois law.

The District Judge in his opinion (R. 88 *et seq.*) so clearly analyzes the Illinois cases on this point that we will not repeat a detailed analysis here. Suffice it to say that the *Rebenstorf* decision is solely based on the *dictum* of the *Scanlan* case and cites as authority three Illinois cases none of which is at all in point nor does it discuss, comment on, or distinguish other Illinois cases holding to the contrary. It is this decision which the Court of Appeals says creates a "conflict" between the First and Second District, not mentioning decisions of the other two districts supporting the *Crandall* rule. We believe it is clear that the Court of Appeals in so deciding failed to give due consideration to the weight of authority among the decisions of all four Appellate Districts of the state.

The following are Illinois Appellate Court decisions which support the *Crandall* rule:

First District.

Ebbert v. *Metropolitan Life Ins. Co.*, 289 Ill. App. 342 (1937).

Wayne v. *Travelers Ins. Co.*, 220 Ill. App. 493 (1921).

Robison v. *United States Health and Accident Ins. Co.*, (Abstract decision) 192 Ill. App. 475 (1915).

Martin v. *Illinois Commercial Men's Association*, 195 Ill. App. 421 (1915).

Second District.

Welte v. *Metropolitan Life Ins. Co.*, 305 Ill. App. 120 (1940).

Strehlow v. *Aetna Life Ins. Co.*, 183 Ill. App. 50 (1913), Cert. den. 186 Ill. App. xxxiii.

Crandall v. *Continental Casualty Co.*, 179 Ill. App. 330 (1913).

Third District.

Schroeder v. *Police & Firemen's Ins. Co.*, 300 Ill. App. 375 (1939).

Fourth District.

Klinke v. *Great Northern Life Ins. Co.*, 318 Ill. App. 43 (1943).

Although as noted by the Court of Appeals the *Rebenstorf* decision is the last decision of the First District, still the earlier cases of that Court should not be ignored, especially since the *Rebenstorf* case is not supported by any case it relies on and does not discuss these former decisions, as is clearly shown in the trial court's opinion (R. 88 *et seq.*) to which we again invite this Court's atten-

tion. Since the Court of Appeals did not analyze the decisions of the intermediate appellate courts of Illinois, it did not apply the principle set forth by this Court in the *Six Companies* and *West* cases as above noted.

The record does not disclose any "persuasive authority" that would indicate that the Illinois Supreme Court would rule contrary to the great majority and the unquestionably better-reasoned Illinois decisions except a statement in the Court of Appeals' decision, not supported by any citation of cases, that the Court believes that the weight of authority thruout the country supports the *Rebenstorf* case. Because of this statement, petitioner in its petition for rehearing (R. 139) cited cases from nearly every important jurisdiction showing that the overwhelming weight of authority thruout the country does not support the *Rebenstorf* rule and does support the *Crandall* rule. In fact the two cases from other jurisdictions most strongly relied on by respondent were shown to have been subsequently reversed in favor of the *Crandall* rule.

CONCLUSION.

It is respectfully requested that this petition for writ of certiorari be granted.

Respectfully submitted,

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No. 264

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Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX

	PAGE
ARGUMENT	4
I. The Court of Appeals' decision follows the law of the State of Illinois	4
II. The Court of Appeals adhered to the principle of Erie v. Tompkins	8
III. The Court of Appeals is not rewriting the contract between the parties	8
CONCLUSION	9
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	1

AUTHORITIES CITED.

CASES.

Burns v. Metropolitan Life Ins. Co., 283 Ill. App. 431	7
Christ v. Pacific Mutual Life Ins. Co., 312 Ill. 525; 144 N. E. 161	6
Crandall v. Continental Casualty Co., 179 Ill. App. 330	4
Ebbert v. Metropolitan Life Ins. Co., 289 Ill. App. 342; 7 N. E. 2nd 336; affd. 369 Ill. 306; 16 N. E. 2nd 749	4
Erie Railroad Co. v. Tompkins, 304 U. S. 64; 58 S. Ct. 817; 82 L. Ed. 1188	4
People v. Harvey, 286 Ill. 593; 122 N. E. 138	5
Lang v. Metropolitan Life Ins. Co., 115 F. 2d 621	8
Nelson v. Business Men's Assurance Co. of America, 108 F. 2d 363	8
Reberstorf v. Metropolitan Life Ins. Co., 299 Ill. App. 71; 19 N. E. 2nd 420	8
Sartor v. Arkansas Natural Gas Corporation, 321 U. S. 620; 88 L. Ed. 967	5-6
Silverstein v. Metropolitan Life Ins. Co., 254 N. Y. 81; 171 N. E. 914	9

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

IN ANSWER TO PETITIONER'S SUMMARY STATEMENT OF THE MATTER INVOLVED.

The summary statement of the matter involved as set forth in the petitioner's petition (Page 2) is inaccurate and, in some respects, untrue. The stipulation of fact referred to by the petitioner (Rec. Page 33) merely stipulates that the records of various hospitals, clinics and doctors, who attended Mr. Preston, might be admitted in evidence as being genuine without the necessity of proof thereof. These documents show that Mr. Preston suffered a coronary thrombosis in June of 1940, from which he recovered. Later, he had some difficulty with his right foot becoming numb and cold and, in 1943, he went to Johns Hopkins

Hospital and was examined by Dr. Hamman and treatment prescribed. The condition of the foot greatly improved and, prior to the accident sustained by him, the condition had become stabilized and dormant, if not completely cured. His condition has been diagnosed as arterio-sclerosis. Nowhere in the record is it shown that the respondent "had been suffering from either arterio-sclerosis or Buerger's Disease, a peripheral vascular disease in the right foot and leg and a recognized disease in the medical concept of the word" except in the affidavit of Dr. Theis in support of the motion for summary judgment. It must also be remembered that Dr. Theis never saw the respondent. There is no dispute of the fact that the respondent struck his foot against the corner of his desk and sustained a severe bruise on his toe. The motion for summary judgment in the District Court was supported by the affidavit of Dr. Theis and, in opposition thereto, the respondent filed two affidavits, one by Dr. Graham (Rec. Page 81), and the other by Dr. Jack (Rec. Page 83), both of whom had been attending physicians to Mr. Preston. The petitioner states (Page 3) that these affidavits in no way contradicted either the stipulated facts or the petitioner's medical affidavit, which is untrue. In Dr. Theis' affidavit (Rec. Page 30), he comes to the conclusion, from the examination of the records subject to the stipulation of fact, that the plaintiff was suffering from Buerger's Disease and that as a result thereof, he lost his leg. The affidavits of Dr. Graham and Dr. Jack state that Mr. Preston was suffering from a peripheral vascular disease which had become dormant and stabilized and that Mr. Preston would not have lost his leg had it not been for the accident which he suffered.

The petitioner also states (Page 4) that the ruling of the Court of Appeals has the effect of rewriting the contract of insurance. This is not the court's opinion. Since

the insuring and exclusion portions of the policy, partially quoted by the petitioner, relate to losses suffered through disease, and not through accident, we think the petitioner is endeavoring to rewrite the contract to provide that the insured must suffer an accident while in perfect health in order to be entitled to coverage. If the insurer meant that compensation would be paid under the policy only to persons who were perfect physical specimens at the time an accident is suffered, it could easily have been so stated in the policy. The Court of Appeals' opinion merely stated that it was error in the case to enter summary judgment on opinion evidence, and that a trial should be had to determine whether the plaintiff lost his leg as a result of the accident.

AS TO THE QUESTIONS PRESENTED BY PETITIONER.

The statement of Illinois law under paragraph 1 of the petition (Page 4) is wholly erroneous as there are numerous Illinois cases which allow recovery on an accident policy where the insured was suffering from a pre-existing disease; the whole question being whether or not the loss resulted from the accident.

Under point 2 (Petn. Page 4), we have never considered that *Erie* v. *Tompkins* required courts to follow decisions by "implication".

Under point 3 (Petn. Page 5), we do not think that it is necessary to examine every case decided by the appellate courts of the state to determine what the law of the state may be. When the court of last resort of the state has denied an appeal from an intermediate appellate court, of the last case directly in point which has been appealed to such court of last resort, such is determinative of the law of the state.

ARGUMENT.

I.

The Court of Appeals' Decision follows the law of the State of Illinois.

The petitioner in his argument under Points I A and I B (Petn. Pages 11, 12) relies upon *Ebbert* v. *Metropolitan Life Ins. Co.*, as decided by the Illinois Appellate Court, 289 Ill. App. 342, 7 N. E. 2nd 336 (1937), and the appeal therefrom to the Supreme Court of Illinois, 369 Ill. 306, 16 N. E. 2nd 749 (1938), in the contention that the rule of *Erie* v. *Tompkins*, 304 U. S. 64; 58 S. Ct. 817; 82 L. Ed. 1188 (1938), was not followed by the Court of Appeals. These cases were cited by the petitioner, both in the appellee's brief, as well as in its petition for rehearing before the Court of Appeals. It is apparent from the reading of the opinion of the Court of Appeals that the cases cited to it were read with care, and that the court took great pains in its opinion (Rec. Page 111, 112) to set forth the fact that the doctrine of *Erie* v. *Tompkins* was being meticulously followed.

The petitioner contends that the Court of Appeals did not follow "the implications" of the two *Ebbert* decisions and refers to the old Illinois case of *Crandall* v. *Continental Casualty Co.*, 179 Ill. App. 330 (1913), as the controlling principle and the guiding light of both the Appellate Court and the Supreme Court in this case. So far as we can find, in neither the Appellate Court case nor the Supreme Court case is the *Crandall* decision even mentioned. We thus feel that we must reiterate the statements made in our answer to the petition for rehearing in the Court of Appeals, that the petitioner has completely misapprehended

the decision of the Court of Appeals, as well as the law of the State of Illinois.

The Court of Appeals decided that it was error for the district judge to enter a *summary judgment* based on *opinion evidence,* and that the plaintiff was entitled to a trial upon the merits. This is the law of Illinois, for the Supreme Court of Illinois, in the case of *People* v. *Harvey,* 286 Ill. 593, at pages 604-605; 122 N. E. 138 at page 143, said:

> "There can be no question that the weight to be given the testimony of experts is to be determined by the jury. 'There is no rule of law which requires them to surrender their judgment or to give a controlling influence to the opinions of scientific witnesses' (The Conqueror, 166 U. S. 110; see to the same effect, 5 Ency. of Evidence, sec. 637, and cases there cited, 'Even if several competent experts concur in their opinion and no opposing expert evidence is offered, the jury are still bound to decide the issue upon their own fair judgment assisted by the statements of the experts. * * * Nevertheless, the testimony of an expert may not be arbitrarily rejected, but, like the evidence of every other witness, it is to be considered by the jurors, who are to accord to it influence, much or little, according as it appeals to their intelligent and impartial minds in view of all the facts and circumstances developed upon the trial and the common knowledge and experience of mankind, and, when such common knowledge utterly fails, the expert opinion may, of necessity, become controlling. * * * But the weight to be given to the opinions of witnesses testifying as experts is always a matter to be determined by the jury from all the circumstances appearing in evidence."

Attention is also invited to the decision of this Honorable Court in *Sartor* v. *Arkansas Natural Gas Corporation,* 321 U. S. 620; 88 L. Ed. 967 (1944), and cited by the

Court of Appeals (Rec. 114) which said, in referring to expert testimony (page 627 U. S., 972 L. Ed.):

> "The rule has been stated 'that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony. The jury, even if such testimony be uncontradicted, may exercise their independent judgment.'"

In the *Ebbert* case, the Appellate Court's opinion centered entirely around the question of whether or not the insured died as a result of "accidental means". Ebbert had submitted to an operation for the removal of his tonsils and, while under the anesthetic, death occurred. The insured's widow sought recovery under the policy on the grounds that he had died by "accidental means". The court went to great lengths to carefully review the Illinois decisions as to what is "accidental means", citing from the Supreme Court case of *Christ* v. *Pacific Mutual Life Ins. Co.*, 312 Ill. 525; 144 N. E. 161, and, on page 355 quoting therefrom, as follows:

> "The court properly instructed them that the jumping off the platform was the means by which the injury, if any sustained, was caused; that the question was whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term 'accidental' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected'; that if a result is such as follows from ordinary means voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means.'

" 'The *Barry case* is a leading case, which is usually cited in cases on accident policies involving the question of what constitutes an accident. The language quoted was approved in *Higgins* v. *Midland Casualty Co.*, 281 Ill. 431, which quoted from *Bryant* v. *Continental Casualty Co.*, 107 Tex. 582, as follows: "The proper and true test in all instances of voluntary action is that defined in the *Barry case.* If in the act which precedes the injury, though an intentional act, something unforeseen, unexpected and unusual occurs which produces the injury, it is accidentally caused." ' "

The court also refers to *Burns* v. *Metropolitan Life Ins. Co.*, 283 Ill. App. 431, in which the insured, while suffering from vertigo, was killed as the result of a fall to the sidewalk from the window of the apartment in which she lived, and in which recovery was permitted under identical provisions of the policy. It will be noted that in this case the disease itself caused the accident which resulted in death.

It must also be remembered that the trial court heard the *Ebbert* case *without a jury.* When the Appellate Court case was appealed to the Supreme Court, only two points were made in the decision, both of which were with respect to the Illinois Civil Practice Act. The first point being that the Appellate Court, under the Practice Act (Ill. Rev. Stats. 1937, Chap. 110, par. 216), had the authority *where a jury has been waived* to reverse without remanding; the other point of the decision being that the Supreme Court, under the Civil Practice Act (Ill. Rev. Stats. 1937, Chap. 110, par. 213), is bound by the findings of fact of the Appellate Court. The court does not discuss the findings of fact in any manner whatsoever and the cases cited by it relate solely to the procedural question. The *Ebbert* case is completely out of point.

II.

The Court of Appeals adhered to the principle of Erie v. Tompkins.

The last case in the First Appellate District for Illinois from which leave to appeal was denied by the Supreme Court, 299 Ill. App. xvii, was *Rebenstorf* v. *Metropolitan Life Ins. Co.*, 299 Ill. App. 71, 19 N. E. 2nd 420. The *Rebenstorf* decision was also cited with approval by the Court of Appeals for this circuit in *Nelson* v. *Business Men's Assurance Co. of America*, 108 F. 2d 363 (1939) and *Lang* v. *Metropolitan Life Ins. Co.*, 115 F. 2d 621 (1940). We think that the Court of Appeals completely followed the doctrine of *Erie* v. *Tompkins* since it followed the last case in the Illinois Appellate Courts from which an appeal was denied by the Supreme Court, and also since, as stated in the opinion (Rec. Page 118), the weight of authority supports the rule of that case.

III.

The Court of Appeals is not rewriting the contract between the parties.

The petitioner, on page 15 of its petition, urges upon this Honorable Court that the Court of Appeals, by its decision, attempted to rewrite the contract between the parties. It must be remembered that the petitioner's policy issued to Mr. Preston was an accident policy, not a health policy. The insuring and exclusion clauses partially quoted by the petitioner so indicate. We do not believe it was the intention of the parties to the insurance contract to provide coverage only if the insured was a perfect, physical specimen at the time the accident occurs or, as so

aptly put by Judge Cardozo in *Silverstein* v. *Metropolitan Life Ins. Co.*, 254 N. Y. 81; 171 N. E. 914:

> "A policy of insurance is not accepted with the thought that its coverage is to be restricted to an Apollo or a Hercules."

If so, there would be few, if any, recoveries on accident policies.

The doctrine of "proximate cause" is advanced by the petitioner in its petition, not by the Court of Appeals. To borrow petitioner's language in "plain, ordinary and popular meaning", Mr. Preston had an accident and lost his leg. The Court of Appeals merely decided that it was error for the District Court to enter summary judgment against him, based on opinion evidence, and that the respondent was entitled to a trial on the merits of the case.

CONCLUSION.

This Honorable Court is respectfully requested to deny the petition for the writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 264

HOMER M. PRESTON,

Respondent,

vs.

AETNA LIFE INSURANCE COMPANY,

Petitioner.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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INDEX

PAGE

Argument

1. Essential medical facts undisputed 1
2. Summary judgment appropriate on opinion evidence if no disagreement 2
3. Proximate cause theory is relied on by Court of Appeals and respondent 3
4. Denial of leave to appeal adds nothing to *Rebenstorf* decision 4
5. Rewriting insurance contract 4

Conclusion 5

AUTHORITIES CITED.

Crandall v. Continental Casualty Co., 179 Ill. App. 330 3

Graham v. White-Phillips Co., 296 U. S. 27, 56 S. Ct. 21 4

Marks v. Pope, 289 Ill. App. 558 4

People v. Grant, 283 Ill. 391 4

People v. Harvey, 286 Ill. 593 2

Rebenstorf v. Metropolitan Life Insurance Co., 299 Ill. App. xvii 4

Sartor v. Kansas Natural Gas Corporation, 321 U. S. 620, 64 S. Ct. 724 2

Scanlan v. Metropolitan Life Insurance Co., 93 F. (2d) 942 3

Soden v. Clancy, 269 Ill. 98 4

Smith-Hurd Ill. Anno. Stat. Ch. 110, Secs. 198, 199 4

Ill. Rev. Stat. 1933 Ch. 110, Sec. 120 4

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

We feel compelled to make the following few comments regarding the points raised in respondent's brief in opposition to our petition for a writ of certiorari:

1. Essential medical facts undisputed.

Respondent has misconstrued our statement of facts by pointing to minor and immaterial differences in the various medical affidavits introduced in the trial court by the plaintiff and by the defendant.

There is no dispute regarding the following, which are all the essential and material medical facts in this case:

(a) At the time of the accident the insured was suffering from some kind of a disease of the circulatory system in his right foot and leg (R. 32, 81, 85).

(b) As a medical fact, the pre-existing disease and the accidental blow combined to cause the loss of the insured's right leg (R. 32, 81, 85). In other words, the loss would not have happened but for the accident, *and* it also would not have happened but for the pre-existing disease.

2. Summary judgment appropriate on opinion evidence if no disagreement.

Under such circumstances a summary judgment based on opinion evidence is entirely appropriate. The agreed expert opinion would be binding on a jury if the questions were presented to a jury because as a matter of law no "common knowledge and experience" of the members of the jury could be relied on to contradict the agreed opinion of medical experts on a *technical* medical question.

The summary judgment question is of course a federal question, and is not controlled by Illinois law as respondent assumes (Br. 5). However, it is of interest to note that under Illinois law, as shown by the very quotation from *People* v. *Harvey,* 286 Ill. 593, 604, set forth at page 5 of respondent's brief, when the "common knowledge and experience of mankind" upon which every jury verdict is based fails because of the facts and circumstances of the question involved, then expert opinion of necessity becomes controlling on a *technical* question.

The *dictum* cited by respondent from the *Sartor* case does not aid him, for, as stated by Justice Jackson (321 U. S. 620, 624; 64 S. Ct. 724, 727), there the opinion evidence could not be given conclusive effect because it was contradicted by other testimony. In the case at bar, there is no evidence whatsoever to contradict the opinion evidence of the experts of both parties on the two essential medical questions above noted.

Further, the Court of Appeals did not hold, as is asserted by respondent, that summary judgment could not be based on undisputed opinion evidence, for the opinion in two places states that if the *Crandall* rule contended for by petitioner is adopted the summary judgment is proper (R. 116, 118).

3. Proximate cause theory is relied on by Court of Appeals and respondent.

It is significant to note that although respondent nowhere in his brief states that he is resting his case on the theory of proximate cause, still throughout his brief he repeatedly poses the issue presented by this case in the terms of what *single* factor caused the loss of insured's leg (Br. 2, 3). This is in actual fact an attempt to apply the proximate cause doctrine.

Respondent also contends (Br. 9) that petitioner and not the Court of Appeals has advanced the theory of proximate cause. This is not correct. The Court of Appeals adopted the rule announced in the *Scanlan* case (R. 118) and stated that rule to be that the evidence there was sufficient to support the verdict of the jury "that the injury was the *proximate* and sole cause of death" (R. 116; emphasis supplied). Indeed, under the undisputed facts of this case the order of the Court of Appeals remanding this case for trial on the merits leaves open for determination by a jury only the one question as to what was the proximate cause of the loss.

The undisputed medical facts here show that the loss of the leg was not due to the *single* factor of accidental injury but to a *combination of two causes*—the pre-existing disease and the injury. As we have contended in our original brief, the theory of proximate cause is entirely inapplicable in such a case. We believe it is significant

that respondent in his brief now attempts to disassociate himself from that theory, for by so doing he admits that proximate cause is not applicable under Illinois law. Eliminating proximate cause, what issue remains for trial?

4. Denial of leave to appeal adds nothing to Rebenstorf decision.

Respondent infers (Br. 3, 8) without citation of authority that the denial by the Illinois Supreme Court of a petition for leave to appeal the Appellate Court's decision in the *Rebenstorf* case (299 Ill. App. xvii) adds such weight to that decision as to make it determinative of the Illinois law. This is not correct. Under the Practice Act of 1907 as amended, denial of *certiorari* by the Supreme Court of Illinois did not make the opinion of the intermediate appellate court binding in other cases. *Graham* v. *White-Phillips Co.,* 296 U. S. 27, 56 S. Ct. 21 (1935); *People* v. *Grant,* 283 Ill. 391 (1918); *Soden* v. *Clancy,* 269 Ill. 98 (1915); *Marks* v. *Pope,* 289 Ill. App. 558, 565 (1937). The weight to be given to the Supreme Court of Illinois' denial of a petition for leave to appeal under the Civil Practice Act of 1933 is the same as that formerly given to denial of *certiorari* under Section 121 of the Practice Act of 1907 as amended. Ill. Rev. Stat. 1933, Ch. 110, Sec. 120; Smith Hurd Ill. Anno. Stat. Ch. 110, Sec. 198, 199.

5. Rewriting insurance contract.

Respondent's assumption (Br. 3, 8) that petitioner's position in this case is that anyone who recovers under an accident policy containing the exclusion provisions here present must be a "perfect physical specimen" is particularly inept. The exclusion clauses of the insurance contract contain no such requirement. A bodily condition not constituting a disease, or a disease not contributing to a

loss would not prevent recovery. The contracting parties have a right to agree that a loss contributed to by a disease will not be covered and there is no reason for treating such an exclusion in any different light than other exclusions contained in the contract prohibiting recovery for losses growing out of hernia, suicide, war, aviation, etc. (R. 10), all of which exclusions have repeatedly been sustained by the courts.

CONCLUSION.

We believe other points raised by respondent have been covered adequately in our original brief. Again, we respectfully request that a writ of certiorari be granted because of the important federal questions involved.

Respectfully submitted,

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